UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 99-6895-CIV-SEITZ/GARBER

BROWARD VENDING,

Plaintiff,

vs.

NATIONAL INDIAN GAMING COMMISSION,

Defendant.
_____/

ORDER GRANTING DEFENDANT NATIONAL INDIAN GAMING COMMISSION'S MOTION TO DISMISS

THIS MATTER comes before the Court on Defendant, National Indian Gaming Commission's ("NIGC") Motion to Dismiss [DE-24], Plaintiffs Daniel Goldberg and Ronald Nolte, d/b/a Broward Vending's ("Broward Vending") Memorandum in Opposition [DE-29] and NIGC's Reply [DE-34]. NIGC moves for dismissal under FED. R. CIV. P. 12(b)(1) and 12(b)(6). NIGC asserts that the claim lacks standing and is not ripe for review and thus should be dismissed for lack of subject matter jurisdiction. *See* FED. R. CIV. P. 12(b)(1). For the reasons stated below, this Court agrees that it does not have jurisdiction to review the NIGC's determination and thus that this case should be dismissed. Additionally, because Broward Vending fails to state a claim upon which relief can be granted, NIGC's motion to dismiss shall be granted. *See* FED. R. CIV. P. 12(b)(6).

BACKGROUND

For the purposes of this motion the Court has assumed all facts alleged in the Complaint to be true. Below is a summary of the facts from Broward Vending's perspective.

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Broward Vending manufactures, markets, leases, and sells video amusement games. These games are made available to the general public as well as federally recognized Indian tribes. One of the games Broward Vending developed was the Challenger 9. The Challenger 9 is an electronic video game, similar in appearance to an electronic slot machine, that challenges players to use their memory and timing in an attempt to align the repeating characters in a particular pattern. Successful players are then awarded points or credits.

When the Challenger 9 became operational and was about to be placed with approximately twelve Indian tribes,[1] the NIGC informed Broward Vending that it should seek approval of the game as an amusement device.[2] Consequently, on September 2, 1998, the parties met to discuss the classification of the Challenger 9. Thereupon, NIGC experimented with the game and came to the conclusion that the Challenger 9 was a game of chance and not of skill and therefore was a class III gambling device under the Indian Gaming Regulatory Act of 1988 ("IGRA") that could only be legally played on Indian lands pursuant to a tribal-state compact.[3]

As a result of the NIGC's determination, Broward Vending lost market share and the

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1 Broward Vending asserts in its Complaint that it manufactures and sells machines to the general public as well as Indian tribes. However, it appears that the Challenger 9 was principally earmarked for Indian tribes because upon the NIGC's determination that it was a game a chance, Broward Vending claims the game suffered a loss of value forcing the layoff of sixty-eight (68) employees.

2 The Indian Gaming Regulatory Act of 1988 ("IGRA") does not regulate amusement devices, it regulates gaming devices. Gaming devices are divided into three classes. Class I gaming is described as "social games solely for prizes of minimal value or traditional forms of Indian gaming." 25 U.S.C. § 2703(6). Class II gaming includes games of chance such as bingo or poker. *See* 25 U.S.C. § 2703(7). All other forms of gaming are listed under Class III. *See* 25 U.S.C. § 2703(8). Each class is progressively more regulated.

3 This conclusion was presented in a letter written by Barry W. Brandon, General Counsel to the NIGC and addressed to Ron Nolte, the President of Broward Vending.

Challenger 9 suffered a diminution of value. This loss ultimately: (1) forced Broward Vending to layoff 68 employees; (2) adversely affected Broward Vending's relationships with various clients; and (3) placed Broward Vending at a competitive disadvantage. Accordingly, Broward Vending brought this action pro se[4] seeking a declaratory judgment that the Challenger 9 is not a game of chance and injunctive relief preventing the NIGC from attempting to remove or prevent the placement of the Challenger 9 on Indian lands.

ANALYSIS

NIGC states two separate grounds for dismissal. First, it contends that the Complaint should be dismissed under FED. R. CIV. P. 12(b)(1) because: (1) Broward Vending lacks standing to bring the action; (2) there has not been a final decision by the NIGC and thus the action is not ripe; and (3) there is no judicial review available under the statute. Second, NIGC asserts that Broward Vending failed to state a cause of action upon which it can seek relief. *See* FED. R. CIV. P. 12(b)(6). Because of the clear Congressional intent to preclude judicial review of the NIGC's determination and because Broward Vending does not have an express or implied private cause of action under the IGRA, NIGC's motion to dismiss shall be granted.

Standard of Review

To state a claim, FED.R.CIV.P. 8(a) requires, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." The court must "take the material allegations of the complaint and its incorporated exhibits as true, and liberally construe the complaint in favor of the Plaintiff." *Burch v. Apalachee Community Mental Health Services, Inc.*, 840 F.2d 797, 798

[4] Broward Vending filed the Complaint pro se, in a shotgun manner, and without citation to any case or specific provision of the IGRA. However, prior to its Response in Opposition to NIGC's Motion to Dismiss, Broward Vending retained counsel.

(11th Cir. 1988) (citation omitted), *aff'd*, 494 U.S. 113 (1990). The law in this Circuit is well-settled that "the 'accepted rule' for appraising the sufficiency of a complaint is 'that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *SEC v. ESM Group, Inc.*, 835 F.2d 270, 272 (11th Cir. 1988) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), *cert. denied*, 486 U.S. 1055 (1988). The moving party bears a heavy burden. *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 953 (11th Cir. 1986).

A. *Subject Matter Jurisdiction*

1. Standing

NIGC asserts that Broward Vending lacks standing to bring its claim under the IGRA and thus the complaint should be dismissed for lack of subject matter jurisdiction. *See* FED. R. CIV. P. 12(b)(1). The constitutionally required element of standing exists to ensure that the action before the Court meets the "case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). Three elements of standing are constitutionally required: (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the challenged action of the defendant; and (3) it must be likely that the injury would be redressed by a favorable ruling. *Id.* at 560-61. Additionally as a prudential standing requirement, plaintiffs must show that the interest sought to be protected is within the statute's "zone of interests." *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488 (1998); *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

It is clear that, taking all of the allegations in the complaint as true, Broward Vending has met all three constitutional standing requirements. Broward Vending has alleged: (1) financial injury and

loss of business; (2) its injuries resulted from the NIGC's decision that Challenger 9 was a class III gambling device; and (3) its financial injury would likely be redressed by a favorable ruling from this Court. However, Broward Vending's claim that it, as a vendor, falls within the zone of interests of the IGRA, is a much closer call.

NIGC asserts that Broward Vending cannot pass the zone of interests test because outside vendors are, at best, incidental beneficiaries of the protections of the IGRA. The IGRA's Declaration of Policy states that its goals are: (1) to provide a statutory basis for gaming operations by Indian tribes as a means of strengthening tribes; (2) to ensure that Indian gaming is conducted fairly and honestly by shielding it from organized crime and corruption; and (3) to establish the NIGC to meet congressional concerns regarding Indian gaming. *See* 25 U.S.C. § 1702. Because there is no evidence under the plain language of the IGRA regarding the interests of vendors, NIGC asserts that Broward Vending is not within the statute's zone of interests and therefore lacks standing. *See Air Courier Conf. of America v. American Postal Workers Union*, 498 U.S. 517, 526 (1991) (holding postal employees were not within the zone of interest of the private express statutes and thus could not challenge the Postal Service's suspension of its statutory monopoly over international remailing).

However, the Supreme Court, albeit without expressly stating so, has recently pulled back from the strict "zone of interests" requirements enunciated in *Air Courier* in its recent decisions in *Bennett v. Spear*, 520 U.S. 154 (1997) and *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479 (1998). In *National Credit Union*, the Supreme Court held that a court "should not inquire whether there has been a congressional intent to benefit the would-be plaintiff." 522 U.S. at 489. Later, in *Bennett*, the Supreme Court noted that a plaintiff's claim need not seek to vindicate

the overarching purpose of the statute in order to fall within the zone of interests. *See* 520 U.S. at 175. Rather, the plaintiff's claim must only "arguably" be within the zone of interests of the statute. *See National Credit Union Admin.*, 522 U.S. at 493.

It is clear that vendors do not fall within the overarching purpose of the IGRA. However, taking all allegations in Broward Vending's Complaint as true, and given the recent Supreme Court decision, this Court will assume that Broward Vendings' claims as an incidental beneficiary of permissible Indian gaming are, for the purposes of this motion, arguably within the zone of interests of the IGRA.

2. Ripeness

NIGC also asserts that Broward Vending relied upon an advisory opinion of the NIGC and thus Broward Vending's action should be dismissed for lack of ripeness. Because advisory opinions are not intended to be final, the NIGC claims that the action is not yet ripe for review by this Court.

However, Broward Vending contends that a letter from the General Counsel of the NIGC is a *de facto* final agency decision because it is unlikely that any tribe would ignore the NIGC's determination and risk an enforcement action and possible sanctions by allowing the Challenger 9 to be placed upon their land. Assuming, for the purposes of a motion to dismiss, that Broward Vending's assertion is true, it is clear that although the opinion may be labeled advisory, the NIGC "expected conformity" with its determination. *National Automatic Laundry and Cleaning Council v. Schultz*, 443 F.2d 689, 702 (D.C. Cir. 1971).

"An agency may not... avoid judicial review 'merely by choosing the form of a letter to express its definitive position.'" *National Resources Defense Council, Inc. v. EPA*, 22 F.3d 1125, 1132-33 (D.C. Cir. 1994) (quoting *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525,

1531 (D.C. Cir. 1990)). Rather courts are to give a "realistic appraisal" of the impact of the agency's action to determine if it functions as final. *Fort Sumter Tours, Inc. v. Andrus*, 440 F.Supp. 914, 918 (D. S.C. 1977). Because the realistic outcome of the NIGC's letter was Indian tribes refusing to allow the Challenger 9 on their lands, the advisory opinion functioned as a final decision and thus is ripe for review. *See Bennet v. Spear*, 520 U.S. 154, 170 (1997).

3. Judicial Review under the IGRA

NIGC's final reason why this Court may not review its action is that the IGRA does not permit judicial review of advisory opinions. The IGRA explicitly states that sections 2710, 2711, 2712, and 2713 are "final agency decisions for purposes of appeal to the appropriate Federal district court." 25 U.S.C. § 2714. NIGC argues that Congress' express grant of jurisdiction under those four sections implies a prohibition on judicial review over any actions outside of these sections. The Supreme Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994) held that when a statute grants judicial review over some sections, but not over others, a court is to assume that Congress' silence was intentional and judicial review should be limited to the expressed sections. Thus, because this Court reads the IGRA to only permit review over the sections enumerated in 25 U.S.C. § 2714 and Broward Vending is not seeking review of a final action taken under one of those sections, the Complaint shall be dismissed.

While Broward Vending correctly argues that there is a presumption in favor of judicial review, that presumption is rebuttable upon a showing of "clear and convincing evidence of a contrary legislative intent." *See Hayes Int'l Corp. v. McLucas*, 509 F.2d 247, 258-59 (5th Cir. 1975) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). Clear and convincing evidence of Congress' desire to preclude judicial review exists "if congressional intent to preclude judicial

review is 'fairly discernible' in the detail of the legislative scheme." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

In *Thunder Basin*, the Supreme Court found Congressional intent to preclude judicial review in a scheme that permitted judicial review only for enforcement actions under the Federal Mine Safety and Health Amendments Act of 1977 ("Mine Act").[5] *See* 510 U.S. at 208. Similar to the Mine Act, section 2714 of the IGRA expressly permits judicial review only of sections 2710, 2711, 2712, and 2713. These sections represent final agency actions and the implied corollary of section 2714 is that other agency actions are not final and thus not reviewable. *See Block*, 467 U.S. at 347 (finding that "[i]n a complex scheme of this type, the omission of such a provision is sufficient reason to believe Congress intended to foreclose consumer participation in the regulatory process.").

Both the Mine Act and the IGRA, at times, require that a party wishing to challenge an agency determination risk some sort of penalty before being entitled to judicial review. The main difference between Broward Vending and the mine operator in *Thunder Basin* is that while the mine operator could weigh the cost-benefit alone and decide whether it was worthwhile for it to challenge the determination and risk the penalty, Broward Vending must rely on an Indian tribe to risk a penalty by ignoring the NIGC's advisory opinion. Obviously by relying on a third-party to press the claim, the cost side of the analysis becomes heavier. However, the fact that Broward Vending

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[5] The Mine Act authorizes miners' representatives to be appointed for the purpose of making unannounced inspections of the mines' safety. In *Thunder Basin* a mine operator challenged the appointment of union officials as the miners' representatives in federal court prior to the commencement of any enforcement action. *See* 501 U.S. at 205. In a manner quite similar to the IGRA, the Mine Act explicitly provided for judicial review only over certain enumerated sections. The Supreme Court held that because Congress granted review over some sections of the Mine Act, its silence as to other sections, particularly the pre-enforcement sections, was intended to preclude judicial review. Thus the mine operators were required to risk citation and penalty before being afforded judicial review. *Id.*

cannot press the claim alone does not overcome Congress' intent to streamline the IGRA's process by precluding certain judicial review. *See Thunder Basin Coal Co.*, 510 U.S. at 216 (noting Congress' desire to channel and streamline the enforcement process). Accordingly, this claim is not judicially reviewable and NIGC's motion to dismiss shall be granted.

B. *Failure to State a Cause of Action*

Assuming arguendo that judicial review over this action was permissible, NIGC's motion to dismiss would still be granted because Broward Vending's Complaint fails to state a cause of action upon which relief could be granted. *See* FED. R. CIV. P. 12(b)(6). In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court set out four factors that determine whether a private right of action is implicit in a statute: (1) is the plaintiff part of the class the statute intends to benefit; (2) did Congress intend to either create or deny the remedy; (3) would the remedy be consistent with the underlying purpose of the statute; and (4) is the cause of action one that is traditionally left to state law? *See Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1246 (11th Cir. 1999).

Broward Vending fails at least three of the four *Cort* tests. First, it is clear that Broward Vending was not part of the class that the IGRA intends to benefit. *See Seminole Tribe of Florida*, 181 F.3d at 1247 (stating that the first test is answered by looking to the statute's language); 25 U.S.C. § 2702 (declaring that the policy of the statute is for the "operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"). Second, Congress created an intricate remedial scheme with express remedies without including any provision for vendors. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996) (holding that the judiciary should be hesitant to create additional remedies to supplement a carefully crafted and intricate remedial scheme). Third, an implied remedy for Broward Vending

would not be consistent with a statute meant to enhance tribal economic development and tribal-State relations. *See* 25 U.S.C. § 2702. Finally, because the first three factors counsel against finding an implied private right of action, it is unnecessary for this Court to consider the fourth factor. *See Seminole Tribe of Florida*, 181 F.3d at 1250.

In *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1049 (11th Cir. 1995) the Eleventh Circuit held that a management contractor did not have a private cause of action under the IGRA, even though the IGRA expressly contemplates Indian tribes entering into management contracts for the operation of gaming activities. *See* 25 U.S.C. § 2711. A game vendor such as Broward Vending is an even more attenuated incidental beneficiary of the IGRA. Thus, Broward Vending's Complaint fails to state a cause of action upon which relief can be granted and the Complaint must be dismissed. Accordingly, it is hereby

ORDERED THAT:

(1) Defendant's Motion to Dismiss is GRANTED;

(2) the Complaint is DISMISSED with prejudice;

(3) all pending motions are DENIED as moot; and

(4) this CASE IS CLOSED.

DONE AND ORDERED in Miami, Florida, this 5th day of April, 2001.

PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

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